No. 428

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IN THE

Supreme Court of the United States

October Term, 1968

~~Rockland County Clerk's Index No. 2486—1964~~

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY,

Petitioner,

against

PATRICK J. CAMPBELL, as President of Local Union 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent.

~~Rockland County Clerk's Index No. 2566—1965~~

~~In the Matter of the Arbitration~~

~~between~~

LOCAL UNION NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent,

against

~~TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY~~

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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ROCKLAND COUNTY CLERK'S INDEX NO. 2566—1965

IN THE MATTER OF THE ARBITRATION

BETWEEN

LOCAL UNION NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent,

against

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the Court of Appeals of the State of New York dated April 10, 1968 (A. pp. 1a, 2a) which order was entered in the County Clerk's Office of the County of Rockland, State of New York on May 27, 1968. Said Order denied a Motion for reargument but amended the remittitur to show that upon the appeal there were presented and necessarily passed upon questions under the Constitution of the United States. The Motion for reargument was directed to the New York State Court of Appeals' decision of February 14, 1968 which unanimously affirmed the Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, dated April 17, 1967. The Order of April 17, 1967 affirmed two Orders of the Supreme Court of the State of New York, County of Rockland. The first Order was dated October 31, 1966 confirmed the award of an arbitrator for a total sum of Eighteen Thousand Five Hundred ($18,500.00) Dollars. The second Order was dated October 26, 1966 and dismissed a suit for a declaratory judgment which asked the Court to declare that there was no valid contract in effect between the parties. The award of the arbitrator was dated June 23, 1966.

Opinions Below

The New York State Court of Appeals affirmed the Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department without opinion in 21 N. Y. 2nd 796, 288 N. Y. S. 2d 629, 235 N. E. 2d 770, (A. p. 2a). However, the New York State Court of Appeals referred to the case of *Oleshko* v. *State Liquor Authority*, 21 N. Y. 2d 778, 288 S. 2d 474, 235 N. E. 2d 447, (A. p. 2a) which was decided the same day without opinion. The opinion of the Appellate Division of

the Supreme Court of the State of New York, First Judicial Department in *Oleshko* v. *State Liquor Authority*, 29 App. Div. 2d 84, 285 N. Y. S. 2d 696 (A. pp. 3a-11a) is printed under Rule 23(i) as an opinion in a companion case. On a motion to reargue and to amend its remittitur the motion to reargue was denied but the motion to amend the remittitur was granted. 21 N. Y. 2d 969 (A. p. 1a).

The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department is reported in 27 App. Div. 2d 942, 279 N. Y. S. 2d 41 (A. pp. 12a-13a). The opinion of the Supreme Court of the State of New York, County of Rockland, Hawkins J., was not reported but is annexed (A. pp. 13a, 14a). The opinion of the arbitrator, Harry Uviller, was not reported but is attached (A. pp. 15a-18a).

There were previous motions and appeals. The opinion of the Supreme Court of the State of New York, County of Rockland, Donohue J., was not reported but is annexed (A. pp. 28a, 29a). An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. It is reported in 23 App. Div. 2d 371, 261 N. Y. S. 2d 500; (A. pp. 19a-22a).

The opinion of the Supreme Court of the State of New York, County of Rockland, Pette, J., was not reported but is annexed (A. p. 27a). An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. It is reported in 23 App. Div. 2d 371, 261 N. Y. S. 2d 500; (A. pp. 19a-22a).

The opinion of the Supreme Court of the State of New York, County of Rockland, Fanelli, Jr., was not reported but is annexed (A. pp. 26a, 27a). An appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. It is reported in 25 App. Div. 2d 534, 267 N. Y. S. 2d 778 (A. pp. 24a, 25a).

Jurisdiction

The Order of the New York State Court of Appeals which denied a Motion for reargument but amended its remittitur to show that a Constitutional issue was presented and necessarily passed upon was dated April 10, 1968 and was entered on May 27, 1968 in the County Clerk's Office of Rockland County, New York.

Jurisdiction of this Court to review the Order of the New York State Court of Appeals by writ of certiorari is invoked under Title 28 of the United States Code, Section 1257 (3). Petitioner claims that he suffered a penalty for claiming his constitutional privilege against self-incrimination. The respondent had brought about his indictment and then proceeded against the petitioner in arbitration before the criminal matter was disposed of. During the arbitration petitioner asserted his privilege against self-incrimination and thereby lost his only effective witness and had a judgment entered in the amount of Eighteen Thousand Five Hundred ($18,500.00) Dollars.

Questions Presented for Review

Is it a denial of due process and the imposition of a penalty for claiming a constitutional privilege to allow a civil proceeding to go to judgment in advance of a criminal indictment growing out of the same facts and where petitioner was indicted on the complaint of the moving party in the civil action, and claimed that he could not testify in the civil action without waiving his privilege against self-incrimination in the criminal action and could not fairly defend himself in the civil action if he claimed his constitutional privilege against self-incrimination?

Statement of the Case

Petitioner is a native of Norway who had only a grade school education in Norway. He was trained as a carpenter in his native land and worked as a carpenter in the United States from 1959 until January of 1964 when he started in business for himself as an individual doing carpentry sub-contracting work primarily on one family homes.

In January of 1964 a delegate of the respondent Carpenter's Union spoke to petitioner and asked him if he would sign a contract with the Union. Three copies of a printed contract were given to petitioner. He was told to sign two copies of the contract and mail them to the respondent Union. After the next monthly meeting of the Union the contract would be signed by the Union and a copy mailed to petitioner. No copy of the alleged contract has ever been mailed to the petitioner. Paragraph "Thirteenth" of the alleged contract (A. p. 42a) provided that a performance bond in the amount of Five Thousand Dollars ($5,000.00) has to be posted to guarantee payments to the Union. Since petitioner was single, a citizen of Norway and did not have the financial assets to secure a bond said bond was never posted. In a suit for a declaratory judgment the Union admitted Paragraph "Twelfth" of the Complaint (A. p. 34a) that the Union considered a condition precedent to be the posting of the bond. The answer to the Complaint is annexed (A. pp. 38a, 39a). During this period of time petitioner was not represented by an attorney.

On or about August 11th, 1964 the Union mailed a Notice of Intention to Arbitrate under the alleged contract. Under section 7503 (c) of the Civil Practice Law and Rules of New York, a Motion must be made within 10 days if there is a claim of no valid agreement. The petitioner did not obtain counsel until more than ten days after receipt of the Notice of Intention to Arbitrate.

After mailing the Notice of Intent to Arbitrate the Union picketed a job where petitioner was the only carpenter contractor who was working at the time. A circular was given out which said that the carpentry contractor did not have a contract with the Union (A. pp. 37a).

On October 7th, 1964, petitioner appeared before an Arbitrator, Bernard Newman. The Union refused to give a signed copy of the contract to petitioner, so petitioner left the arbitration proceeding on the grounds that there was no valid contract.

The Union then brought a Complaint to the District Attorney of Rockland County alleging that Petitioner had committed a crime under Section 962a of the Penal Law of the State of New York (A. p. 32a). On September 1, 1967 Section 962a of the Penal Law was transferred to Section 198C of the Labor Law. The penal law provided for a fine of $500 and up to one year imprisonment where an employer failed to pay benefits to an employee within thirty days after such payments are required to be made.

The October 1964 Grand Jury indicted the petitioner (Copy of Indictment A. pp. 30a, 31a).

Following the indictment Petitioner brought a suit for a declaratory judgment (Copy of Complaint A. pp. 33a, 36a) asking the court to declare that there was no valid contract between petitioner and the Union. (Copy of Answer A. pp. 38a, 39a). An Order to Show Cause was obtained by petitioner staying the arbitration proceeding. Petitioner claimed that he could not defend himself in the arbitration proceeding while under indictment. The Supreme Court of Rockland County then dismissed the suit for a declaratory judgment and ordered the arbitration to proceed (A. pp. 28a, 29a). Appeal was taken and the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department unanimously reinstated the Complaint

but ordered the Arbitration to proceed (A. pp. 19a, 22a). Under Section 3211 (b) of the Civil Practice Law and Rules, the Court searches the record to see if there is any insufficiency in the Complaint where it can be dismissed. See McKinney's Book 7B Civil Practice Law and Rules 3101-3400 1967 Pocket Supplement, page 143. Since the Court unanimously reinstated the Complaint and the defendant had submitted an answer before moving to dismiss all petitioner had to do is prove what was in the Complaint and the indictment and arbitration would be dismissed.

The suit for a declaratory judgment was reached for trial on October 11, 1965 but on that day the Union moved to amend its Answer and strike the matter from the trial calendar. The motion was denied by Pette, J., (A. p. 27a).

On March 18, 1966 the parties appeared before an arbitrator, Harry Uviller. Petitioner moved to stay the arbitration until the criminal indictment was disposed of and there would be no fear of a future indictment. He claimed that it would be imposing a penalty for claiming a constitutional right if he was not free to testify at the arbitration where he would have been his own best witness. The arbitration proceeded over four days and petitioner claimed his privilege against self-incrimination. With no practical defense because of claim of the constitutional privilege petitioner was penalized by having a judgment of Eighteen Thousand Five Hundred ($18,500.00) Dollars awarded (A. p. 18a).

The arbitrators award was confirmed by the Supreme Court of Rockland County and the suit for a declaratory judgment was dismissed (A. p. 13a). On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department the lower court was affirmed (A. pp. 12a, 13a). The New York State Court

of Appeals also affirmed (A. p. 2a), denied a motion for reargument but amended the remittitur to show that a Constitutional issue had been presented and necessarily passed upon (A. pp. 1a, 2a).

When the suit for a declaratory judgment asking that the Court declare there was no valid contract, was unanimously reinstated by the Appellate Court, the petitioner continued working without paying any benefits under the alleged contract. The alleged contract ran until June 30, 1968. Under Section 962a of the Penal Law of New York each week that the Petitioner failed to pay benefits he was subjected to the possibility of another indictment. He could have been reindicted approximately two hundred and thirty times. Since the statutes of limitation on misdemeanors in New York is two years, he would not be free from future indictments until June 30, 1970. Petitioner sought to have the suit for a declaratory judgment tried first so that petitioner, if successful, would know that he was free from criminal prosecution and if he was unsuccessful in the suit for a declaratory judgment he would then live up to the alleged contract. A trial on the first indictment would not have prevented subsequent indictments. A series of criminal prosecutions would have exhausted petitioner both physically and financially.

Federal Questions First Raised

On November 2, 1964, Petitioner was advised by the District Attorney of Rockland County that he had to appear in the County Court of Rockland County to answer an indictment under section 962a of the Penal Law of the State of New York.

On or about November 7, 1964 an action was commenced in the Supreme Court of Rockland County for a declaratory judgment. Part of the complaint states as follows: (A. pp. 35a, 36a),

Fifteenth: That on November 2, 1964, the plaintiff was advised by the District Attorney of Rockland County to appear in the County Court by reason of his having been indicted for violation of Section 962a of the Penal Law of the State of New York, for failing to live up to the terms, conditions and provisions of a certain proposed agreement in writing which said indictment refers to.

Sixteenth: That upon information and belief the said indictment was handed down on a complaint brought by the defendant and/or the trustees of a welfare and pension fund covering members of defendant's local 964.

Nineteenth: That any testimony that the plaintiff might give in the arbitration proceeding could be used against him in the criminal proceedings where the defendant is indicted since both the arbitration and the criminal proceedings are based upon the proposed contract.

The answer (A. pp. 38a, 39a) of the defendant admitted paragraphs "Sixteenth", "Nineteenth".

An affidavit of the petitioner, Totmod Langemyr, sworn to November 7, 1964 submitted in support of an Order to Show Cause stated: "The Union therefore is proceeding against me both civilly and through the District Attorney criminally. I cannot fairly defend myself in the arbitration proceeding where the evidence I give may be used against me in a criminal proceeding. It is my contention that the alleged agreement never came into effect because the union refused to deliver a copy of the agreement signed by a proper union official because I failed to post a bond. In my suit for a declaratory judgment a finding by the court that no contract was ever entered into would result in a dismissal of the arbitration proceeding. If the arbitration proceeding is allowed to continue I cannot properly defend myself without endangering my liberty in the criminal matter. It is my belief that no contract ever existed but in the

event that the arbitration proceeding should continue and I am unable to testify it in, a substantial judgment may be entered against me thereby causing me to go out of business and possibly through bankruptcy and thereby cause me irreparable injury".

An affidavit of attorney, Gerard E. Molony, sworn to November 21, 1964 submitted in reply to a cross motion of the Union stated:

"In the event that the stay of arbitration is terminated the plaintiff would lose his right under Constitution of New York State, Article 1, Section 6, to claim his privilege against self-incrimination. His failure to testify on the arbitration proceeding would probably result in substantial money damages and in the event that the plaintiff would testify on the arbitration proceeding under the lax rules of evidence information developed from statements made by him could be used in his criminal prosecution. Plaintiff also has a privilege against self-incrimination under the fifth amendment of the U. S. Constitution as it is embodied in the due process clause of the 14th amendment of the U. S. Constitution. This Federal right is a result of the decision of the U. S. Supreme Court in the case of *Malloy* v. *Hogan*, 378 U. S. 1, which was decided on June 15, 1964. In arbitration proceeding the arbitrator would not be bound by strict rules of evidence; since the matter in dispute involves the question as to whether a contract ever existed this matter certainly should be decided first by the courts and not by arbitration".

The Federal Question was briefed and argued before the Supreme Court of Rockland County. Judge Donohue in his opinion (A. pp. 28a, 29a) did not mention the federal question. On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department the federal question was briefed and argued but was

not mentioned in the Court's opinion (A. pp. 19a, 22a). However, on a subsequent motion in the Supreme Court of Rockland County, Judge Fanelli in an opinion (A. pp. 26a, 27a) reviewed the briefs and record in the first appeal and states how the federal question was raised in both appellant's and respondents' briefs.

In arbitration, Petitioner against raised his privilege against self-incrimination (A. pp. 17a, 18a).

"After Motion to postpone hearings until after the indictment is disposed of was denied, in conformity with previous court rulings, the attorney participated in the hearings by fully cross-examining witnesses and by engaging in argument and summary. Although he presented one witness, he reiterated his inability to call Tormod Langemyr as a witness or to produce books and records due to the existing indictment and right of Mr. Langemyr to refrain from testifying granted to him by the Fifth Constitutional Amendment."

In the Supreme Court of Rockland County, on a motion to confirm the award of the Arbitrator the federal constitutional issue was raised in an affidavit of Gerard E. Molony, attorney dated, September 1, 1966. "Langemyr was indicted when he walked out of an arbitration because there was no contract. It is admitted that the Union made the complaint which led to the indictment. The same facts involved in the arbitration proceeding are involved in the criminal proceeding which is still pending. At the opening of the arbitration hearing and at each subsequent hearing I requested the Arbitrator to adjourn the hearing until the indictment was disposed of and until the possibility of any subsequent indictment would have passed. It was claimed that it was a violation of Mr. Langemyr's constitutional rights under the fifth and fourteenth amendments of the United States Constitution and under Article 1 Section 6 of the New York State Constitution not to grant an ad-

journment where the client is a one man operation and could not properly defend himself without giving up his constitutional privileges against self incrimination. The failure of the Arbitrator to grant an adjournment under these circumstances constitutes misconduct." It was also raised on oral argument and in a brief but the Court in its opinion, Hawkins, J., (A. pp. 13a, 14a) did not discuss the federal constitutional question.

On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the federal constitutional issue was briefed and argued. The Court in its Opinion (A. pp. 12a, 13a) discussed the Federal Constitutional question but held that *Spevack* v. *Klein,* 385 U. S. 511 and *Garrity* v. *New Jersey,* 385 U. S. 493 did not apply.

An appeal was taken to the New York State Court of Appeals on Constitutional grounds. The lower court was affirmed without opinion although the Court of Appeals referred to the case of *Oleshko* v. *State Liquor Authority,* which opinion in the lower court (A. pp. 3a-11a) discussed the Constitutional issue.

The Court of Appeals subsequently amended its remittitur to show that a Constitutional issue had been raised and necessarily passed upon.

Reasons for Issuance of the Writ

1. The State Court has decided a federal question not theretofore determined by this court.

The privilege against self-incrimination has not remained static from the time of its adoption as part of the Bill of Rights. The Supreme Court of the United States has by decisions continually broadened the meaning of the

privilege so that it remains truly meaningful as conditions exist today.

In *Boyd* v. *United States,* 116 U. S. 616, the privilege was extended to civil actions. *Malloy* v. *Hogan,* 378 U. S. 1, extended the privilege to state court actions.

Petitioner was confronted with Hobson's choice. He could claim his privilege against self-incrimination in the civil action and have a large judgment entered against him or he could testify in the civil action and then see his testimony used in the subsequent criminal trial to take away his freedom. Petitioner took the lesser of the two evils but if the criminal trial was held first and there was no possibility of a future indictment the petitioner would have been accorded the full protection of his constitutional privilege.

In *Griffin* v. *California,* 380 U. S. 609, the Court stated that penalty is not restricted to fine or imprisonment but means the imposition of any sanction which makes assertion of the Fifth Amendment privilege costly. In *Garrity* v. *New Jersey,* 385 U. S. 493, the Appellants had the choice to either forfeit their jobs or incriminate themselves. This was the anti-thesis of free choice to speak out or to remain silent. In *Spevack* v. *Klein,* 385 U. S. 511 the court held that disbarment and the loss of professional standing are powerful forms of compulsion to make a lawyer relinquish the privilege. Also, *Gardner* v. *Broderick,* decided June 10, 1968.

In *New York Times* v. *Sullivan,* 376 U. S. 254, the Court held that the proposition that Fourteenth Amendment is directed against state action and not private action is inapplicable in cases presenting questions of extent to which constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct.

In the present matter the Union is in effect the Prosecutor. Section 962 A of the Penal Law of New York amounts to special legislation where a criminal complaint would not be made by a police officer but by a Union member.

With civil and criminal actions arising out of the same facts in violation of the Internal Revenue Laws, Food and Drug Laws, Anti Trust Laws, and Security and Exchange Laws, it is most important for the individual to know whether he has a constitutional right to have a criminal trial held prior to any civil action so that the accused individual can claim his privilege in the criminal action but properly defend himself in the civil action by testifying. This issue is of great importance in all the federal and state courts of the nation. It has been properly raised in this case and it is respectfully submitted should be answered by the Court even if it is adverse to the Petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GERARD E. MOLONY,
Attorney for Petitioner.

APPENDIX

Amendment of Remittitur

21 N. Y. 2d 969

TORMOD LANGEMYR, Doing Business as Tom Carpentry Construction Company, Appellant, *v.* PATRICK J. CAMPBELL, as President of Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondent.

In the Matter of the Arbitration between LOCAL UNION No. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Respondent, and TORMOD LANGEMYR, Doing Business as Tom Carpentry Construction Company, Appellant.

Submitted February 26, 1968; decided April 10, 1968.

Motion to amend remittitur granted. Return of remittitur requested and, when granted, it will be amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Appellant contended that while he was under indictment with respect to the same subject matter as is involved in the arbitration proceeding, which indictment was procured by the complaint of respondent union, he suffered a penalty for claiming his privilege under the Fifth and Fourteenth Amendments of the Constitution of the United States since a judgment in the amount of $18,500 was awarded and appellant was refused an adjournment of the arbitration hearing until the indictment was disposed of and there was no reasonable possibility of another indictment and appellant then claimed his privilege against self incrimination and refused to testify, thus losing his right to a meaningful

defense. The Court of Appeals held that there was no violation of appellant's constitutional rights. [See 21 N Y 2d 796.]

Affirmance by Court of Appeals—No Opinion

21 N. Y. 2d 796; 288 N. Y. S. 2d 629; 235 N. E. 2d 770

Order affirmed, with costs. (See *Oleshko* v. *State Liq. Auth.*, 21 N Y 2d 778, also decided today.) No opinion.

Concur: Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, KEATING, BREITEL and JASEN.

Companion Case Referred to by New York Court of Appeals—No Opinion

21 N. Y. 2d 778; 288 N. Y. S. 2d 474; 235 N. E. 2d 447

ALEX OLESHKO, Appellant, *v.* NEW YORK STATE LIQUOR AUTHORITY, Respondent.

Argued January 18, 1968; decided February 14, 1968.

Order affirmed, with costs, on the opinion at the Appellate Division. (See, also, *Langemyr* v. *Campbell*, 21 N Y 2d 796, also decided today.)

Concur: Chief Judge FULD and Judges BURKE, SCILEPPI, BERGAN, KEATING, BREITEL and JASEN.

Opinion in Court Below—Oleshko v. The New York State Liquor Authority

29 A. D. 2d 84, 285 NYS 2d 696

ALEX OLESHKO, Plaintiff-Respondent, v. THE NEW YORK STATE LIQUOR AUTHORITY, Defendant-Appellant.

Supreme Court, Appellate Division, First Department.

Dec. 19, 1967.

Before BOTEIN, P. J., and STEVENS, EAGER, McGIVERN, and WITMER, JJ.

WITMER, Justice.

This is an appeal from an order granting respondent's motion for a preliminary injunction during the pendency of an action by respondent to enjoin appellant Liquor Authority from proceeding with a hearing to revoke respondent's liquor license on charges growing out of the same facts (alleged bribery) which have given rise to a criminal indictment now pending against respondent, and denying appellant's cross-motion to dismiss the complaint.

The facts alleged and asserted by the plaintiff below and on this appeal and undisputed by appellant are that, based upon alleged events occurring on respondent's premises in Nassau County in June 1965 and on July 2, 1965, respondent was indicted in that County on charges of gambling and of bribery. Thereafter appellant served notice upon respondent of a hearing to be held June 10, 1966 to revoke his liquor license by reason of the alleged acts for which respondent was indicted. At the request of the Nassau County District Attorney the hearing was adjourned on various occasions until February 28, 1967, the district attorney stating that he did not want his

witnesses against respondent to testify at appellant's hearing until after the trial of the pending indictment. On February 28, 1967, on the representation that the criminal trial was imminent, and upon the request of respondent, appellant's hearing officer adjourned the hearing for a few months, subject to call on further notice. It was noted at that time that the gambling charge against respondent had been dismissed, leaving only the bribery charge pending in criminal court, Nassau County. On May 12, 1967, a further notice of hearing by appellant was returnable. Respondent then assured appellant's hearing officer that the criminal case in Nassau County had been assigned to a trial part and that the trial would occur shortly. Appellant then adjourned the hearing to a "final" date, June 28, 1967, with warning that there would be no further adjournment. Respondent made objection on constitutional grounds before the hearing officer, demanding that in no event should the hearing be held before the criminal trial; and thereafter, on June 16, 1967 respondent instituted this action to enjoin appellant Authority from proceeding with the hearing during the pendency of the criminal indictment against him. In his complaint he has alleged in effect that it will be a denial of due process of law to him for the hearing by the Authority to be held before the criminal trial; and that he has a constitutional right to remain mute at the criminal trial, but that this will be of no avail to him, if, to protect his liquor license, he must testify before the Authority, and thus make his testimony available to the District Attorney. He also alleged that the criminal trial would be concluded within one or two months, and that therefore the Authority would not be prejudiced by the further delay.

[1, 2] Appellant submits that it is vested with the duty to supervise its licensees and in the public interest to suspend or revoke a license held by one who shall "suffer or permit * * * (the licensed) * * * premises to become disorderly" (Alcoholic Beverage Control Law, section 106, subd. 6); and that in the performance of such duty it is authorized and even required to conduct hearings on charges leading to suspension or revocation of licenses (Alcoholic Beverage Control Law, section 119). It contends that it is not for the court to interfere with the Authority's administrative acts before a determination is made, but only to review its acts thereafter. We agree generally with this contention; but we also recognize that in an appropriate case, to prevent injustice the court is empowered to intervene with respect to the performance of a statutory duty by a public board or authority. (People ex rel. Negus v. Dwyer, 90 N.Y. 402, 407; Barlow v. Craig, 210 App.Div. 716, 206 N.Y.S. 293; Matthes v. Collyer, 32 Misc.2d 224, 223 N.Y.S.2d 280; Paliotto v. Town of Islip, 31 Misc.2d 447, 24 N.Y.S.2d 466; Burack v. State Liquor Authority of State of New York, D.C., 160 F.Supp. 161; and CPLR 6311.)

[3-5] Generally, however, a court will not grant a preliminary injunction in the absence of a showing of a clear right to the injunctive relief sought. (See Park Terrace Caterers, Inc. v. McDonough, 9 A.D. 2d 113, 191 N.Y.S.2d 1001; and 7 Weinstein-Korn-Miller, New York Civil Practice, ¶¶6301.18 and 6301.32.) A plaintiff must do more than allege mere conclusions. In the case at bar respondent has expressed fear of loss of constitutional rights and of prejudice if appellant proceeds with the hearing but there is no satisfactory showing of how he may be injured. The difficulty with respondent's position is that he asks the court to assume that the Authority

will violate his constitutional rights when it conducts the hearing. This we may not do.

[6] To the contrary, upon the facts presented we may properly assume that the Authority will not violate respondent's constitutional rights. For example, since the gambling charge against respondent in the criminal case has been dismissed, there is no reason why the Authority may not conduct its hearing with respect to that charge without legal objection from respondent. Moreover, even as to the bribery charge, it is clearly within the scope of the Authority's duties to inquire concerning the particular nature of the charge against respondent and as to whether under the circumstances thereof it should temporarily suspend respondent's license pending the outcome of the indictment. (See Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873, 874-875.) Furthermore, respondent has not shown that he has exhausted his rights to protect himself in other ways. No satisfactory explanation is made for the inordinate delay in bringing the case to trial or why respondent has not moved to dismiss the indictment for failure to bring it to trial.

[7] It may very well be that should the Authority *revoke* respondent's license after a hearing, solely on the basis of the pending bribery indictment, it would constitute a denial of due process of law to respondent, for such precipitate action would not appear to be essential to the public welfare. (See Silver v. McCamey, supra.) Civil actions should not be permitted to prejudice a pending criminal case when such prejudicial action may reasonably be avoided. (See Campbell v. Eastland, 5 Cir., 307 F.2d 478, 487, cert. den. 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed. 2d 502; United States v. Parrott, D.C., 248 F.Supp. 196, 199-

202; Perry v. McGuire, D.C., 36 F.R.D. 272; Note: Concurrent Civil and Criminal Proceedings, 67 Columbia Law Review, 1277.) But of course we may not assume nor speculate in advance of action by the Authority that it will thus transgress upon respondent's constitutional rights.

[8-10] With respect to the cross-motion for dismissal of the complaint we have already indicated that with appropriate allegations such an action may be maintained. Upon the allegations of this complaint and the admitted facts, however, we find that respondent has no such cause of action. Moreover, we hold as a matter of discretion that rarely should an action for relief of the nature sought herein be maintained. In our view an Article 78 proceeding will afford all the relief needed. An administrative body cannot compel one to testify in violation of his constitutional rights. If a licensee's license be revoked on the basis of a determination made in violation of his essential rights of due process, the determination may be reviewed and set aside in an Article 78 proceeding. We believe that this is the more expeditious and orderly way in which to deal with such problems.

The order appealed from is reversed and the motion for a preliminary injunction is denied upon the law and the facts, and the cross-motion to dismiss the complaint is granted on the law and the facts and as a matter of discretion, with costs and disbursements to the appellant.

Order entered on September 7, 1967 reversed, upon the law and the facts, with $50 costs and disbursements to the appellant, and the motion for a preliminary injunction denied, and the cross-motion to dismiss the complaint granted on the law and the facts and as a matter of discretion, with costs.

Opinion in Court Below

All concur except BOTEIN, P. J., who concurs in the result.

McGIVERN, J. dissents.

BOTEIN, Presiding Justice (concurring in the result).

I concur in the result, mainly because plaintiff has not shown any reason for the delay in bringing the two and one-half year indictment to trial and also does not indicate that he has made any application for dismissal of the indictment for lack of prosecution.

McGIVERN, Justice (dissenting).

I dissent and would affirm.

The acts allegedly committed by the licensee and which brought him into collision with the authorities, occurred in June and July of 1965. Following a long series of adjournments before the S.L.A., largely at the instance of the District Attorney, and with the acquiescence of the S.L.A., the licensee made his first appearance before the Authority in February of 1967. At that time, his attorney requested a further adjournment on constitutional grounds and with the suggestion that laches against the Authority had already set in; he said:

> "• • • and I submit that this hearing should be adjourned so that none of the testimony given here can be used by the District Attorney in view of the fact that the testimony in this proceeding could very well be used by the District Attorney against him in the Criminal Court matter, and I further submit that this proceeding was commenced by a notice which you will observe is dated June 2, 1966".

Opinion in Court Below

And the Hearing Commissioner, in granting the adjournment, said:

> "In view of that we will adjourn this hearing with an open date, with the understanding that as soon as you would hear, you will advise in writing as soon as the criminal matter is heard, and disposed of."

Then there ensued further adjournments from April 12, 1967, to May 12, 1967, to June 28, 1967, which latter hearing the licensee has sought to enjoin, thus far successfully.

In my view, the analysis of the court at Special Term was correct. If the licensee now testifies at the S.L.A. hearing, his testimony becomes available to the District Attorney and his defense in the criminal trial is shaken. If he stands mute, his license is cast to hazard. For if he remains mute at a hearing, after adverse testimony, the likelihood is that his license will be revoked or suspended, the quantum of proof being far less than that required in a Criminal Court. He should not be impaled on this dilemma. Furthermore, repeated adjournments were granted by the S.L.A. at the importunity of the District Attorney. It is patently inequitable to have adjourned the hearings at the request of the prosecutor, based on expediency, and deny a similar request by the licensee based on constitutional grounds of no mean gravity. As the Court of Appeals said in People v. Donovan, 13 N.Y.2d 148, page 151, 243 N.Y.S.2d 841, page 843, 193 N.E.2d 628, page 629; "It needs no extensive discussion to establish the high place which the privilege against self incrimination enjoys in our free society."

And as was said by the Court of Appeals for the District of Columbia Circuit:

> "[D]ue process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." (Silver v. McCamey, 95 U.S.App.D.C. 318, 221 F.2d 873, 874-875; cf. also, Vol. 67 Columbia Law Review, page 1277, November 1967).

That Special Term had power to act as it did is recognized by the majority herein: "* * * but we also recognize that in an appropriate case, to prevent injustice the court is empowered to intervene with respect to the performance of a statutory duty by a public board or authority. (People ex rel. Negus v. Dwyer, 90 N.Y. 402, 407; Barlow v. Craig, 210 App.Div. 716, 206 N.Y.S. 293; Matthes v. Collyer, 32 Misc.2d 224, 223 N.Y.S.2d 280; Paliotto v. Town of Islip, 31 Misc.2d 447, 224 N.Y.S.2d 466; Burack v. State Liquor Authority of State of New York, D.C., 160 F.Supp. 161; and CPLR 6311.)"

It is no answer to suggest, as does the majority, that if the plaintiff loses his license without due process having been honored, then he has his remedy in an Article 78 proceeding. This places on the licensee an undue and an utterly unnecessary burden. Equity now having jurisdiction of the parties, the subject matter, and having knowledge of the facts, should give complete relief now and put an end to the litigation; it should not relegate the licensee to yet another and a separate proceeding. Kil-

bourne v. Board of Supervisors of Sullivan County, 137 N.Y. 170, 178, 33 N.E. 159, 161; J. C. Turner Lumber Co. v. Lacey, 201 App.Div. 41, 43, 193 N.Y.S. 656, 657.

Nor can this licensee be much of an ogre. If he is, the Authority regards the continuance of his license with a wondrous equanimity. The Authority certainly did not proceed against him posthaste. The facts of his involvement first occurred in June of 1965. The S.L.A. did not insist on a hearing until June, 1967. By that time urgency had fled. And a felony indictment had long been suspended over the licensee framed on the same facts as the Authority would now make the subject of its demand for a hearing. But since the Authority has been so lethargic in seeking a hearing, Equity should hear and respond to the licensee's Macedonian cry.

Pomeroy's Equity Jurisprudence quotes with approval the words of an English Chancellor: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and *reasonable diligence.*" (5th Ed., Vol. 2, page 419).

The motion of the licensee should be granted and the appellant's motion to dismiss the complaint should be denied.

Opinion of Appellate Division, Second Department

27 App. Div. 2d 942, 279 N. Y. S. 2d 41

Tormod Langemyr, Doing Business as Tom Carpentry Construction Company, Appellant, v. Patrick J. Campbell, as President of Local Union 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondent. In the matter of the Arbitration between Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondent, and Tormod Langemyr, Doing Business as Tom Carpentry Construction Company, Appellant.—Two orders of the Supreme Court, Rockland County, dated October 26, 1966 and October 31, 1966, respectively, the first dismissing plaintiff's cause of action and the second confirming an arbitration award, affirmed, with one bill of costs. A respondent in an arbitration proceeding (here the appellant) who is under indictment with respect to the same subject matter as is involved in the proceeding is not entitled as a matter of constitutional right under the Fifth and Fourteenth Amendments of the Constitution of the United States to an adjournment of the proceeding until the indictment is dismissed and until there is no possibility of another indictment. In this case, appellant suffered no penalty by reason of the denial of an adjournment. To the contrary, he was allowed to and did invoke the Fifth Amendment at the arbitration hearing, and thus compelled petitioner to make out its case with independent proof and without the assistance of appellant's books and oral testimony. *Spevack* v. *Klein* (385 U. S. 511), wherein the penalty was disbarment, and *Garrity* v. *New Jersey* (385 U. S. 493), wherein the penalty was forfeiture of a position as police officer and a pension, do not apply to this case. The situation here is analogous to those in *Heit & Weisen-*

thal v. *Licht* (218 App. Div. 753) and *Tobias* v. *North Amer. Importing Co.* (133 Misc. 474, affd. 225 App. Div. 699), wherein the plaintiffs were granted pre-trial examinations of the defendants despite the claim that such examinations might result in the defendants being compelled to incriminate themselves. Ughetta, Acting P. J., Brennan, Rabin, Benjamin and Munder, JJ., concur.

Opinion of Supreme Court—Rockland County

HAWKINS, J.

Petitioner-defendant moves, inter alia, to confirm the award of the arbitrator and the respondent-plaintiff cross-moves to vacate pursuant to Section 7511 (b) 1., CPLR. There, however, is presented no statutory ground whereby the court can impugn the arbitrator's award.

In a prior determination *Langemyr* v. *Campbell*, 23 A. D. 2d 371, 374, the Appellate Division of this department held:

> "After 'arbitration and award' the defendant, if so advised, may renew his motion to dismiss pursuant to CPLR 3211."

This is what the plaintiff now seeks by the motion at bar in addition to the confirmation of the arbitrator's award.

The respondent cites a subsequent opinion rendered in connection with the substantial litigation held to date that

of *Langemyr* v. *Campbell*, 25 A. D. 2d 538, but that merely stayed further proceedings "• • • pending the conclusion of the arbitration proceeding."

The companion determination rendered simultaneously therewith, reported in 25 A. D. 534, is not pertinent to the issue at bar.

The petitioner-defendant's motion is granted in all respects.

Settle order on notice.

JOSEPH F. HAWKINS
J. S. C.

Dated: October 12, 1966

Opinion of Arbitrator Harry Uviller

AWARD

In the Matter of the Arbitration

Between

LOCAL UNION No. 964—UNITED BROTHERHOOD OF CARPENTERS and JOINERS OF AMERICA

and

TOM CARPENTRY CONSTRUCTION CORP.

Amended to Include
LOCAL UNION No. 964—UBS & J. A.

and

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION CO.

Hearings held: March 18th, April 13th, May 5th and May 26, 1966.

Appearances:

For Union:

ROBERT SILAGI, Attorney
SIDNEY R. ZENOVIC
WILLIAM A. SOPKO

For Employer:

GERARD E. MOLONY, Attorney
TORMOD LANGEMYR

From the inception of the hearings, all of which were transcribed verbatim by competent public stenographers, it appeared that the parties made no distinction between the individual, the company and the corporation.

Opinion of Arbitrator Harry Uviller

The case was referred to the undersigned by the State Mediation Board as Local Union No. 964-UBS & J. A. against Tom Carpentry Construction Corp.

However, the notices demanding arbitration, submitted as exhibits, show one dated, August 11, 1964, titled "Local Union 964, UBC & JA vs. Tom Carpentry Corp., and one dated September 16, 1965, titled: "Local Union 964, UBC & JA vs. Tormod Langemyr, d/b/a Tom Carpentry Construction Co."

Also, at the very opening of the hearings, Mr. Molony stated:

> "At this time I am making application for adjournment of the arbitration proceeding on the grounds that my client, Tormod Langemyr, does business as an individual. He is a one-man operation. He is presently under indictment in Rockland County under Indictment No. 64-190."
>
> "I also want to read into the record a complaint brought by Tormod Langemyr, doing business as Tom Carpentry Construction Corp. against Patrick J. Campbell as President of Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL/CIO."

Thereafter each party submitted exhibits of Supreme Court and Appellate Division proceedings, motions and decisions, involving the rights to arbitrate the matters herein under consideration. The exhibits mentioned the parties as Tormod Langemyr, d/b/a Tom Carpentry Construction Co.

The interchangeable use of names was due to the existance of all three.

Opinion of Arbitrator Harry Uviller

Tormod Langemyr signed an agreement with Local 964 on February 6, 1964, as owner of Tom Carpentry Construction Co., which on January 1, 1966, he changed to Tom Carpentry Construction Co., Inc., doing business at the same place as the Company.

The agreement referred to contained provisions requiring payment by the employer to the Welfare Fund, Pension Fund, Vacation Fund and Supplementary Unemployment Benefits Fund and a provision:

> "All of the provisions, conditions and terms of this Agreement shall bind, apply to, and inure to, the benefits of the parties hereto, their successors, assigns or transferees."

The employer made payments of approximately $2,870 to the Funds from February 10, 1964, to September 24, 1964, and thereafter failed to make any further contributions.

The representative of Local 964 submitted evidence and claimed that the employer owed the funds from $30,000 to $49,000.

The attorney for the employer maintained that his client signed the agreement in evidence but never received a copy signed by the Union because the employer did not post a Surety Bond with the Union, as required by the thirteenth provision of the agreement.

After motion to postpone hearings until after the indictment is disposed of was denied, in conformity with previous court rulings, the attorney participated in the hearings by fully cross-examining witnesses and by engaging in argument and summary. Although he presented one witness, he reiterated his inability to call Tormod Langemyr as a witness or to produce books and records due to the existing indictment and right of Mr. Langemyr to refrain

from testifying granted to him by the Fifth Constitutional Amendment.

After carefully reviewing and considering all the evidence and arguments presented by the parties at the four hearings held and after studying and weighing the verbatim transcription of the minutes and the exhibits, the undersigned, who took his Oath of Office as Arbitrator before the hearing commenced, concludes:

That Tormod Langemyr, Tom Carpentry Construction Co., and Tom Carpentry Construction Corp. or Tom Carpentry Construction Co., Inc., underpaid to the Welfare Fund, the Pension Fund, the Vacation Fund and the Supplementary Benefits Fund from February, 1964, to September, 1964, and failed to pay said Funds from September, 1964, to May, 1966, a total sum of Eighteen thousand five hundred ($18,500) Dollars;

That Local 964 has a commitment from Adler & Eichler to pay Four thousand ($4,000) Dollars for the account of the respondents; and that Local 964 may request Cranik, Garson, Silverman & Nowicki to instruct its clients in accordance with its letter of October 8, 1965, to pay to Local 964 the sum of Four thousand ($4,000) Dollars.

Accordingly, Tormod Langemyr, Tom Carpentry Construction Co., Tom Carpentry Construction Corp. and Tom Carpentry Construction Co., Inc., are jointly and severally directed to pay to Local 964, United Brotherhood of Carpenters and Joiners of America the sum of Fourteen thousand five hundred ($14,500) Dollars to be allocated by the latter for the benefit of the Funds hereinabove mentioned.

Dated, June 23, 1966.

HARRY UVILLER
Arbitrator

Opinions on Prior Appeals to Appellate Division

Opinion (23 A. D. 2d 371), 261 N. Y. S. 2d 500
Second Department, June 28, 1965

CHRIST, J.: The action is for a declaratory judgment that a certain paper signed by plaintiff as an employer and delivered to the defendant's union local does not constitute a contract between them. Plaintiff admits signing the paper, but he charges that by reason of certain conditions precedent it did not become a binding agreement. He further admits service upon him of the statutory notice of intention to arbitrate (CPLR 7503). He appeared before the arbitrator but no testimony was ever taken, nor did the arbitrator take his oath. It also appears that, pursuant to the agreement, plaintiff, in fact, had made contributions to the union fund in an amount exceeding $2,800 for the period from February through September, 1964.

The notice of intention to arbitrate was served upon plaintiff on August 11, 1964. In pertinent part it provided: "PLEASE TAKE FURTHER NOTICE that unless within ten days after the service of this notice upon you, you shall comply with §7503 (c) of the Civil Practice Law and Rules and shall apply to stay said arbitration, you shall thereafter be precluded from objecting that a valid agreement was not made". On August 25, 1964 plaintiff responded by serving a notice of motion, together with his own affidavit, to stay the arbitration. His affidavit asserted that there was "a contract between your deponent [Tormod Langemyr] and Local No. 964". When defendant's attorney appeared in court on the return day of that motion, after having served answering affidavits, he found that the motion had not been actually been noticed and was not on the Motion Calendar, and that no one was present on plaintiff's behalf; defendant's attorney noted his appearance

and considered the motion for a stay to have been abandoned. Plaintiff does not dispute his abandonment of the motion.

Apart from all other considerations, plaintiff is now barred from seeking a stay of the arbitration by CPLR 7503 which provides:

"(b) Application to stay arbitration. Subject to the provisions of subdivision (c), a party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made.

"(c) *Notice of intention to arbitrate.* A party may serve upon another party a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought * * * and stating that unless the party served applies to stay the arbitration within ten days after such service he shall thereafter be precluded from objecting that a valid agreement was not made * * *. An application to stay arbitration must be made by the party served within ten days after service upon him of the notice or he shall be so precluded.".

The section itself is quite plain, but a practice commentary to the section makes the effect unmistakable: "Proper service of a proper notice of intention to arbitrate will preclude the raising of the threshold questions [making of a valid agreement] except on an application to stay arbitration made within ten days after the service thereof" (McKinney's Cons. Laws of N. Y., Book 7B, CPLR, pp. 488-489).

Plaintiff's primary authority to the contrary is a Special Term case which calls the 10-day period a "caveat" and

refuses to treat it as a preclusion to the raising of threshold questions (*Matter of Ledo Realty Corp.*, 43 Misc 2d 380 [Schnectady County]). That decision has been criticized in part as follows: "The court's interpretation of the statute may render uncertain the finality of arbitration proceedings. If a party were allowed to raise pre-arbitration questions at any time after the ten-day period allowed by statute, the opposing party could never rely on the conclusiveness of an arbitration award granted him. * * * Moreover, the court's interpretation of CPLR 7503 (c) may tend to subvert the main advantage of arbitration —the speed with which an arbitration controversy can be concluded" (39 St. John's L. Rev. 239 [1964], Biannual Survey of New York Practice).

Matter of MVAIC (*McCabe*) (19 A D 2d 349, 351-354) presented a different aspect of this problem. There, an order denying a stay of arbitration was affirmed, but not because of the 10-day preclusion language of CPLR 7503. The Appellate Division recognized and asserted its general power to grant a stay which was there sought pending the orderly conduct of an examination before trial. Nevertheless, the court felt that under the circumstances a stay was unjustified. The helpful dictum in Justice Eager's opinion in that case clarified the issue; he properly pointed out that the statutory threshold questions were not there involved, but that if they had been the provisions of CPLR 7503 would have precluded the granting of a stay.

Here, the Special Term properly denied a stay and the arbitration should proceed. Since plaintiff was served with the notice of intention to arbitrate pursuant to CPLR 7503 (subd. [c]), and since he failed to seek a stay of the arbitration for the purpose of attacking the existence of the contract, as provided in CPLR 7503, he may not now seek such a stay in a declaratory judgment action.

Opinion (23 A. D. 2d 371)

However, Special Term should not have granted the cross motion to dismiss the complaint pursuant to CPLR 3211. Prior to September 1, 1964 a complaint could be dismissed "on the ground that * * * 5. the cause of action may not be maintained because of arbitration". Effective on that date, the rule (CPLR 3211) was amended to read "because of arbitration *and award*". (Italics added.) The supplementary practice commentary to that section explains the amendment in this way: "The amendment adds 'and award' after arbitration. Its purpose is to clarify that *the only basis for a 3311 dismissal relating to arbitration* is where there has already *been* arbitration and an award has been made in it." (McKinney's Cons. Laws of N. Y., Book 7B, CPLR, 1964 Supp., p. 44.) (Emphasis added.)

The order appealed from must be modified to the extent that the complaint should be allowed to stand.

Opinion, 25 App. Div. 2nd 538, 267 N. Y. S. 2d 890

Tormod Langemyr, Doing Business as Tom Carpentry Construction Company, Respondent, v. Patrick Campbell, as President of Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Appellant.—In an action by an employer against an individual as president of a carpenters' union to declare invalid a purported contract between them, to stay an arbitration proceeding thereunder and for other relief, defendant appeals from an order of the Supreme Court, Rockland County, entered October 22, 1965, which denied his application to strike the action from the Trial Calendar and for other relief. Order modified (1) by striking out the provision that the motion insofar as it was to strike the action from the Trial Calendar is denied and by providing in lieu thereof that such relief is granted and (2) by adding a provision that the motion is further granted to the extent that all further proceedings in the action by both parties are stayed pending the conclusion of the arbitration proceeding. As so modified, order affirmed, without costs. (*Langemyr* v. *Campbell*, 23 A D 2d 371; see, also, *Matter of Local Union No. 964* [*Langemyr*], 25 A. D 2d 534, decided herewith.) Ughetta, Acting P. J. Christ, Brennan, Hill and Hopkins, JJ., concur.

Opinion, 25 App. Div. 2nd 534, 267 N. Y. S. 2d 778

In the Matter of the Arbitration between Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Respondent, and Tormod Langemyr, Doing Business as Tom Carpentry Construction Company, Appellant.—In an arbitration proceeding initiated by a carpenters' union pursuant to its alleged collective bargaining agreement with an employer, the latter appeals from an order of the Supreme Court, Rockland County, entered October 15, 1965, which (1) denied his motion (a) to quash a subpoena duces tecum served upon him at the instance of the union and (b) to stay the proceeding and (2) granted the union's cross motion to compel compliance with the subpoena. Order modified by striking out the words "for examination" from the last ordering paragraph thereof and by adding thereto a provision to the effect that at the hearing the revelation of the contents of the records to be produced by the employer, by his testimony or by inspection by others, shall be subject to his assertion of the privilege against self incrimination. As so modified, order affirmed, without costs. Pursuant to the agreement, the union demanded arbitration of its claim that the employer had neglected and refused to make certain substantial contributions, based on his payroll for the period in question, to trust funds that provide fringe benefits for all union members. During the course of hearings before the arbitrator, the employer was indicted with respect to the same subject matter, under section 962-a of the Penal Law. The union served upon the employer a subpoena requiring him to produce before the arbitrator all his records pertaining to the issues that were specified in its demand for arbitration. The employer moved to quash the subpoena upon the ground that compliance would deprive him of his con-

stitutional privilege against self incrimination. The union cross-moved to compel compliance, upon the grounds that, by the terms of the agreement, it was entitled to an examination of the employer's books and that an audit would furnish the best evidence on the issue. The learned Special Term held that the employer's claim of privilege, prior to his appearance and production of the records, was premature and ordered him to "produce at said hearing *for examination*, the books, papers, records and other things which he was directed to produce by said subpoena" (emphasis supplied). Even though the records be not received in evidence, a direction to produce them and to submit them to examination, in the face of an assertion of the privilege, is an infringement of constitutional rights (*Matter of Hirshfield* v. *Craig*, 239 N. Y. 98, 118; *Matter of Foster*, 139 App. Div. 769; *Matter of Phillips*, 143 App. Div. 522). "The testimony of a written instrument is given as soon as the eye falls upon it and the mind thereby becomes possessed of its contents" (*Matter of Foster, supra*, p. 774). Under all the circumstances, we deem the above modification of the order appropriate (see CPLR 2304 and *Langemyr* v. *Campbell*, 25 A D 2d 538, decided herewith). Ughetta, Acting P. J., Christ, Brennan, Hill and Hopkins, JJ., concur.

Opinions in Prior Motions in Supreme Court, Rockland County

Opinion of Fanelli, J.

FANELLI, J.

The employer's application for an order quashing the subpoena heretofore served upon him in the arbitration proceeding now pending before the arbitrator and for incidental injunctive relief, is, denied; and the union's cross-motion for an order compelling compliance with such subpoena, is, granted. The temporary stay contained in the order to show cause dated September 20, 1965 is vacated.

The fact that the employer is presently under indictment for alleged violation of section 962-a of the Penal Law has been held by the Appellate Division, Second Department to be no bar to such arbitration proceeding (see Langemyr vs. Campbell, 23 App. Div. 2nd, 371). Although Mr. Justice Christ in denying a stay of arbitration and directing that such arbitration proceed, did so upon the ground of estoppel, and, although he did not in his unanimous opinion specifically refer to the then pending indictment, the record on appeal and the briefs submitted by the employer and the union clearly indicate that such argument was fully briefed by both sides before the Appellate Division and, apparently, found to be without merit. In fact, a copy of the indictment was made a part of the employer's complaint in the aforementioned declaratory judgment action. In Point III of his brief before the Appellate Division the employer specifically pointed out that the arbitration proceeding (involving the same matters as contained in the criminal indictment) would deny him the privilege against self-incrimination under the United States and New York State Constitutions. In Point II of its brief the union urged that "Arbitration in advance of a criminal trial under Penal Law, section 962-a does not deprive

plaintiff-appellant of any constitutional privilege against self-incrimination".

Under all circumstances this court repeats the language of Mr. Justice Christ, to wit: *"the arbitration should proceed"*. A person may not refuse to produce documents on the ground that his privilege against self-incrimination may be violated (Matter of Luchenbach, 35 Misc. 2nd, 122; Matter of Gilmartin vs. Lipson, 34 Misc. 2nd, 998). The party should first appear and produce the documents and then assert the privilege (Matter of Edge Ho Holding Corp., 256 N. Y. 374). The employer's attack upon the propriety of the subpoena in this proceeding is premature at this point. The right to refuse to incriminate oneself is a personal right and must be claimed at the time he is asked questions or he is required to produce documents.

Submit one order on notice at Chambers, 271 North Avenue, New Rochelle, N. Y.

Dated: Sept. 29, 1965
New City, N. Y.

s/ Hon. George M. Fanelli, Justice,
Justice of the Supreme Court.

Opinion of Pette, J.

Motion by defendant to strike action from the trial calendar and for leave to amend the answer denied.

Submit order.

Opinion by Donohoe, J.

DONOHOE, J.

This motion for an order enjoining the defendant from proceeding with arbitration is denied. Defendant's cross motion for an order dismissing the complaint on the ground that plaintiff's exclusive remedy is in arbitration is granted.

In this action for a declaratory judgment, plaintiff seeks, in the main, to obtain a declaration that a purported agreement between the plaintiff-employer and Union No. 964 does not constitute a contract. The Twenty-third paragraph of the agreement in dispute provides for the submission of controversies to arbitration.

Certain disputes did arise under the agreement and, on August 11, 1964, the Union gave to the employer a notice of intention to arbitrate which specified the agreement under which arbitration was sought, the issue to be arbitrated and that the employer would be barred from objecting in Court that a valid agreement was not made unless he moved for a stay within ten days under the provisions of CPLR Section 7503 (C).

The plaintiff did move for a stay on or about August 25. He failed to file a note of issue of that motion, however, and to appear on the return day stated in his notice of motion. The motion is deemed abandoned.

There is no point in considering whether the plaintiff participated in arbitration, whether there has been a waiver of the qualification of the arbitrator, or whether questions of fact affecting the validity of the agreement are raised. The plaintiff is absolutely barred by the failure to assert his exclusive remedy under Section 7503 (b) and (c) of the CPLR.

Opinion by Donohoe, J.

The provisions of that section create the sole means of raising the question whether a valid agreement was made. When the plaintiff abandoned his motion directed to that question, his only remaining recourse was to proceed with arbitration. See MVAIC v. Fenrick 33 Misc. 2d 200.

The decision in Grand Central Theatre Inc., v. Moving Picture Machine Operators Union, Local 306, 69 N. Y. S. 2d 115, is not applicable here, as the decision in that case depended upon an extension of time for a motion in the same proceeding. In the case presented, the motion is made in a separate action.

Submit order.

Dated: December 9, 1964.
Cold Spring, New York

HON. JOHN P. DONOHOE
Supreme Court Justice

JOHN P. DONOHOE,
J. S. C.

Indictment

COUNTY COURT

ROCKLAND COUNTY

Ind. # 64-90

THE PEOPLE OF THE STATE OF NEW YORK,

against

TORMOD LANGEMYR.

THE GRAND JURY OF THE COUNTY OF ROCKLAND by this indictment accuse Tormod Langemyr of the Crime of Violation of Section 962-a of the Penal Law of the State of New York, committed as follows:

The said Tormod Langemyr, late of the Hamlet of New City, Town of Clarkstown, County of Rockland and State of New York, at all of the times herein mentioned being the person doing business under the trade name "Tom Carpentry Construction Co.", did execute an agreement on February 6th, 1964 wherein said Tormod Langemyr, doing business as Tom Carpentry Construction Co., did agree to be bound by all of the terms, conditions and provisions of a certain agreement in writing dated July 1st, 1963 between "Contractors And Suppliers Association of Rockland County, New York" and "Local Union No. 964, United Brotherhood of Carpenters and Joiners of America"; by the terms of said agreement, said Tormod Langemyr, doing business as Tom Carpentry Construction

Co. agreed to make payments of money for benefits and wage supplements as defined by Section 220 of the Labor Law of the State of New York, which payments were to be made at New City, New York to the Welfare Fund, Pension Fund, Vacation Fund and Supplementary Unemployment Benefits Fund referred to in said agreement; that thereafter, commencing the 6th day of February, 1964 to and including on or about August 31st, 1964 said Tormod Langemyr, doing business as Tom Carpentry Construction Co., wilfully and wrongfully failed, neglected, omitted and refused to make said payments within thirty days after such payments were required to be made as provided by Section 962-a of the Penal Law of the State of New York, monies totalling approximately $5,000.00 due and owing said Funds; against the form of the statute in such case made and provided and against the peace of the People of the State of New York and their dignity.

MORTON B. SILVERMAN,
District Attorney,
Rockland County, N. Y.

Statute Involved

§962-a Penal Law

§962-a. Failure of employers to provide certain benefits for employees.

In addition to any other penalty or punishment otherwise prescribed by law, any employer who is party to an agreement to pay or provide benefits, or wage supplements as defined in section two hundred twenty of the labor law, and who fails, neglects or refuses to pay the amount or amounts necessary to provide such benefits or furnish such supplements within thirty days after such payments are required to be made, shall be guilty of a misdemeanor and upon conviction shall be punished for a first offense by a fine of five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment. Where such employer is a corporation, the president, secretary, treasurer or officers exercising corresponding functions shall each be guilty of a misdemeanor.

Complaint

SUPREME COURT: STATE OF NEW YORK

COUNTY OF ROCKLAND

[SAME TITLE]

The plaintiff, complaining of the defendant by Molony and Schofield, their attorneys, alleges:

First: At all times hereinafter mentioned the plaintiff Tormdo Langemyr was doing business as Tom Carpentry Construction Company, having its principal place of business in the County of Rockland, State of New York.

Second: At all times hereinafter mentioned Local Union Tormod Langemyr was doing business as Tom Carpentry #964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and hereinafter referred to as Local #964, was and now is an unincorporated association duly existing under and by virtue of the general association laws of the State of New York.

Third: At the time of the commencement of this action, Patrick Campbell was the President of the said local 964.

Fourth: In January, 1964, the plaintiff, who had previously been an employee, went into business for the first time as a self-employed individual.

Fifth: On or about January 15, 1964, the plaintiff, Tormod Langemyr, signed an agreement prepared by the defendant and mailed two copies of the signed agreement to the defendant upon the representation that at the next

monthly meeting of Local #964 an officer of said local would sign one of the copies of the proposed agreement and return it to the plaintiff. Copy of said proposed agreement is annexed as Exhibit 1.

Sixth: That at the time the plaintiff signed said proposed agreement he was not represented by an attorney and the proposed agreement had been prepared by the defendant.

Seventh: That at no time since the plaintiff signed the proposed agreement has the defendant ever delivered a signed copy of the agreement.

Eighth: The proposed agreement provided that the plaintiff was to post a bond which would guarantee the payment of certain benefits under the proposed agreement.

Ninth: That the plaintiff never posted such bond.

Tenth: That on February 10, 1964, the plaintiff was told by a representative of Local 964 that he would not be able to purchase any more stamps for vacation benefits until he posted said bond.

Eleventh: The plaintiff was served by the defendant with a notice of intention to arbitrate dated August 11, 1964, referring to the proposed agreement labeled as Exhibit 1. (Copy of notice of intention to arbitrate annexed as Exhibit 2).

Twelfth: On October 7, 1964, Robert Silagi, attorney for Local Union 964, stated that no copy of the contract had been given to the plaintiff since he had failed to post a bond

and that Local 964 considered this a condition precedent to the delivery of a copy of the proposed agreement signed by an officer of the defendant.

Thirteenth: That the plaintiff has been the Carpenter contractor on a development known as "Stonehedge", located in New City, Rockland County, New York.

Fourteenth: That during the months of August and September, 1964, representatives of the defendant have picketed said development at "Stonehedge" and have handed out printed circulars alleging that the Carpenter contractor does not have a contract with Local 964. (Exhibit 4).

Fifteenth: That on November 2, 1964, the plaintiff was advised by the District Attorney of Rockland County to appear in the County Court by reason of his having been indicted for violation of Section 962A of the Penal Law of the State of New York, for failing to live up to the terms, conditions and provisions of a certain proposed agreement in writing (Exhibit 1 attached) which said indictment refers to. Copy of said indictment is annexed as Exhibit 3.

Sixteenth: That upon information and belief the said indictment was handed down on a complaint brought by the defendant and/or the trustees of a welfare and pension fund covering members of defendant's local 964.

Seventeenth: That the defendant has picketed "Stonehedge" where the plaintiff was Carpenter contractor claiming there was no contract with Local 964 and on the other hand has brought a matter to arbitrate under said proposed contract and has caused the plaintiff to be indicted for violation of said proposed contract.

Complaint

Eighteenth: That no testimony has been given in the arbitration proceedings.

Nineteenth: That any testimony that the plaintiff might give in the arbitration proceedings could be used against him in the criminal proceedings where the defendant is indicted since both the arbitration and the criminal proceedings are based upon the proposed contract.

Twentieth: That plaintiff has no adequate remedy at law.

WHEREFORE: Plaintiff demands judgment against the defendant as follows:

1. That the court declare the rights and other legal relations as between the plaintiff and defendant and declare that no agreement was entered into.

2. That the court permanently stay the arbitration proceeding.

3. That the defendant be permanently stayed from bringing any actions or proceedings against the plaintiff based on the proposed agreement annexed as Exhibit 1.

4. For the costs and disbursements of this action.

5. That the plaintiff have such other and further relief as to this court may seem just and proper.

MOLONY AND SCHOFIELD,
Attorneys for plaintiff.

Union Pamphlet Referred to in Complaint

PUBLIC AND HOME BUYERS

"The Home Builder on this job uses a contractor who does not have a contract with Carpenters, Local 964".

This employer uses non-union carpenters who are paid less than union rates and receive no pension, welfare or vacation benefits. Union carpenters have difficulty maintaining their present union standards and working conditions as long as some employers pay sub-standard rates. Insist upon a home built with skilled union carpenters and according to the highest union construction standards. Buy a home built by local union draftsmen who devote themselves to quality construction.

Help us maintain our agreement, conditions and standards by buying a union made home. Do not patronize developments that use non-union carpenters.

We appeal to you, the public and prospective home buyer, to help maintain the American work standards established by our organization by refusing to buy any home that has been built by any struck contractor, while scab carpenters work under sub-conditions. Morally and legally we are justified in asking for your support and hope you will extend it to us by buying homes built with union carpenters under union conditions.

> We are not asking the employees of this development, or other employees doing business with this development, to refuse to deliver goods or perform any service connected with this development.

Issued by:

UNITED BROTHERHOOD OF CARPENTERS, LOCAL 964, AFL-CIO

8 North Main Street, New City, New York

Answer

SUPREME COURT : STATE OF NEW YORK

COUNTY OF ROCKLAND

[SAME TITLE]

The defendant, answering the complaint of the plaintiff, by its attorney, William M. Mulderig, alleges:

FIRST: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs numbered "Fourth" and "Fifteenth", thereof.

SECOND: Denies each and every allegation contained in paragraphs numbered "Thirteenth", "Seventeenth" and "Twentieth" thereof.

THIRD: Admits so much of the allegation contained in paragraph numbered "Fifth" as states that "on or about January 15, 1964, the plaintiff, Tormod Langemyr, signed an agreement prepared by the defendant," but denies the remainder of the allegation contained in said paragraph.

As and for a First Affirmative Defense:

FOURTH: That the plaintiff has entered into a Collective Bargaining Agreement with the defendant.

FIFTH: That by paragraph "23rd" of said Collective Bargaining Agreement, the parties agreed that if a dispute were unable to be settled, that it should be submitted to arbitration.

Answer

SIXTH: That on or about August 11, 1964, the defendant served the plaintiff with a notice of intention to arbitrate. That upon information and belief, an unsigned copy of the agreement was left in the defendant's possession.

WHEREFORE, defendant demands judgment as follows:

(a) dismissing the complaint with costs;

(b) that the Court declare the rights and other legal relations as between the plaintiff and defendant, and declare that a valid agreement was entered into;

(c) that the Court direct that a dispute between the parties shall be submitted to arbitration;

(d) that the arbitration proceeding presently in effect be continued;

(e) that the plaintiff have such other and further relief as to this Court may seem just and proper.

WILLIAM M. MULDERIG
Attorney for Defendant
Office & P. O. Address
76 Demarest Avenue
West Nyack, New York

To:

MOLONY & SCHOFIELD
Attorneys for Plaintiff

Notice of Intent to Arbitrate

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, whose address is 8 North Main Street, New City, New York, hereby serves upon you its Notice of Intention to Arbitrate:

1. The agreement pursuant to which arbitration is sought is: Agreement between Contractors and Suppliers Association of Rockland County, New York and Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, July 1, 1963 to June 30, 1968, duly signed and executed by both the Union and Employer herein.

2. The issues involved are whether the Employer has violated the following paragraphs of said Agreement, and, if so, to what relief is the Union entitled:

a. Second: Contractors, subcontractors, subsidiaries, responsibilities and obligations of signatories.

b. Third: Hours of labor.

c. Fourth: Holidays.

d. Fifth: Minimum wages.

e. Eighth: Welfare fund.

f. Ninth: Pension fund.

g. Tenth: Vacation fund.

h. Eleventh: Supplementary unemployment benefits.

i. Thirteenth: Contractor performance and surety bond.

j. Eighteenth: Union security provisions.

Notice of Intent to Arbitrate

PLEASE TAKE FURTHER NOTICE that unless within ten days after the service of this notice upon you, you shall comply with §7503(c) of the Civil Practice Law and Rules and shall apply to stay said arbitration, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in Court the bar of a limitation of time.

Dated: New York, N. Y.
August 11th, 1964.

Yours, etc.

LOCAL UNION 964,
United Brotherhood of Carpenters
and Joiners of America, AFL-CIO

By: Robert Silagi
ROBERT SILAGI
Attorney for Union
745 Fifth Avenue
New York, N. Y. 10022
MU 8-2662

To:
TOM CARPENTRY CONSTRUCTION CORP.
58 North William Street
Pearl River, New York

NEW YORK STATE BOARD OF MEDIATION

LOCAL UNION 964,
United Brotherhood of Carpenters and
Joiners of America, AFL-CIO

Excerpts From Alleged Contract

• • • • •

THIRTEENTH: CONTRACTOR'S PERFORMANCE & SURETY BOND.

All Employers, whether Contractors, General Contractors, Sub-Contractors, Home-Builders and/or any other type of Contractor or Employer, must post a Surety Bond obtained from a Carrier licensed to do business in the State of New York, with the Union, prior to the commencement of any work by such Contractor or Employer. Such Bond shall be in the amount of Five Thousand Dollars ($5,000), and must guarantee the payment of wages of all members of the unit employed by such Contractor, and the payment of WELFARE FUND, PENSION FUND, VACATION FUND and SUPPLEMENTARY UNEMPLOYMENT BENEFITS FUND contributions under this Agreement. A copy of such Bond shall be furnished to the Union before the commencement of any work by the Contractor. Where special circumstances require lesser coverage, permission for same may be granted by the Trustees of the Union Welfare Fund. Workman's Comp No. ..... and N. Y. S. D. I. Carrier and No. .....

• • • • •

Excerpts From Alleged Contract

TWENTY-THIRD: GRIEVANCES, DISPUTES AND ARBITRATION.

A: Should any dispute arise between the parties hereto, regarding the interpretation, or application, of this Agreement, or any clause or provision or portion thereof, the parties agree to make an earnest effort to adjust, resolve and settle such dispute. Should the parties be unable to settle the matter, the dispute shall be submitted to Arbitration as set forth in Subparagraph *B* hereof within ten (10) days after the dispute has arisen, or the occurrence of the grievance.

B: The party desiring arbitration shall notify the other in writing, and shall notify the New York State Board of Mediation, in writing, setting forth the issues involved, and the specific section or language of the Agreement covering same. The New York State Board of Mediation shall designate the Arbitrator from its panel of Arbitrators, whose decision shall be made in writing, and shall be final and binding upon both parties to the controversy. The Arbitrator is not empowered to change or modify, in any manner whatsoever, any of the terms, conditions or provisions of this Agreement. Costs of the arbitration shall be shared equally by the parties thereto.

* * * * *

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LIBRARY
EME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 428

ROCKLAND COUNTY CLERK'S INDEX NO. 2486—1964

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY,

Petitioner,

against

PATRICK J. CAMPBELL, as President of Local Union 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent.

ROCKLAND COUNTY CLERK'S INDEX NO. 2566—1965

IN THE MATTER OF THE ARBITRATION

BETWEEN

LOCAL UNION NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent,

against

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY,

Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ROBERT SILAGI,
Attorney for Respondents,
32 Broadway,
New York, New York 10004.

ROBERT SILAGI,
MITCHEL B. CRANER,
of Counsel.

October 1, 1968.

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IN THE

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ROCKLAND COUNTY CLERK'S INDEX NO. 2566—1965

IN THE MATTER OF THE ARBITRATION

BETWEEN

LOCAL UNION NO. 964, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Respondent,

against

TORMOD LANGEMYR, d/b/a TOM CARPENTRY CONSTRUCTION COMPANY,

Petitioner.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Jurisdiction

This court lacks jurisdiction to review the order of the Court of Appeals of the State of New York by writ of certiorari invoked under 28 U.S.C. § 1257(3) because of petitioner's failure to comply with the provisions of 28 U.S.C. § 2101(c).

The Questions Presented

1. Must the petition for a writ of certiorari be dismissed for want of jurisdiction for failure of petitioner to comply with the 90 days' limitation imposed by Title 28 of the United States Code, Section 2101(c)?

2. Where the same facts gave rise to a criminal indictment and a civil action by way of arbitration, and upon a hearing in the arbitration proceeding the petitioner refused to answer questions and instead chose to invoke the Fifth Amendment, claiming that his answers might be used to incriminate him in the pending criminal trial, did the petitioner by asserting his constitutional privilege, and demanding a stay of the arbitration for four years and two months, until the statute of limitations on the criminal proceeding expired, suffer any penalty in that he allegedly was unable to defend himself properly in the arbitration for the reason that he chose to remain mute?

The Statement

For some years prior to 1964, Tormod Langemyr, the petitioner herein, had worked as foreman of a carpentry construction firm in Rockland County, New York. Said firm was a signatory to the standard collective bargaining agreement which had previously been negotiated between an association of carpenter contractors and Local Union 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, the respondent herein. Said agreement was signed both by the association and by more than 200 carpenter contractors in their individual capacities. It con-

tained uniform terms and conditions applicable to all employees. On February 6, 1964, petitioner also signed the standard agreement with the respondent. As foreman of his former employer, Langemyr was required to know and to abide by the terms of the agreement. Consequently, when Langemyr went into business for himself at the beginning of 1964, he was well aware of the agreement's contents and manner in which it was administered.

The agreement signed by the parties herein required, among other things, that each contractor pay supplemental wages to four trust funds established by respondent, to wit, a Pension Fund, a Welfare Fund, a Vacation Fund and a Supplementary Unemployment Benefits Fund. Payments to these funds are supplemental wages to the employees and are calculated as a percentage of the contractor's gross wages paid to his employees. During the period February through September 1964, petitioner made 6 separate payments to the trust funds in an amount exceeding $2,800.00. Each remittance was accompanied by a statement signed by Langemyr certifying that the schedule annexed thereto was true and correct and that "the wages reported represent all wages paid to employees in [Langemyr's] employ for the period specified, under the union contract."

In the summer of 1964, acting under that section of the agreement which permits the union to audit the books of a signatory contractor, the union, by its certified public accountant, conducted an audit of Langemyr's books. The accountant's report showed that petitioner had reported to the respondent a gross payroll of $22,000.00, whereas the true figure was $55,000.00. By such deceit, within seven months, Langemyr cheated his employees, and the trust funds, out of about $5,000.00 in supplemental wages. Upon learning of this swindle, the union demanded payment of the correct amount. When Langemyr refused to pay, the union initiated arbitration in accordance with the grievance section of the agreement.

On August 13, 1964, the respondent served upon petitioner a statutory notice of intention to arbitrate. Langemyr thereupon retained counsel, Gerard E. Molony, Esq., who has represented him in all proceedings herein.[1] Mr. Molony moved to stay arbitration under New York Civil Practice Law and Rules, Section 7503. Petitioner's supporting affidavit, dated August 24, 1964 prepared by Mr. Molony, stated that there was in existence a valid agreement between the parties,[2] but that the demand for arbitration was premature in that the respondent had failed to exhaust all procedural steps in the grievance machinery contained in the agreement. (See Appendix, page 16.) Said notice of motion, and the supporting papers were served upon respondent's counsel. The respondent served answering affidavits upon petitioner's attorney. Upon the return date of the motion, respondent's counsel appeared in Supreme Court of the State of New York, Rockland County, ready to argue and oppose the motion. Mr. Molony, however, had neglected to place his motion upon the motion calendar. Since no one was present on petitioner's behalf, his motion was deemed abandoned. No explanation has ever been forthcoming from either petitioner or Mr. Molony to justify such bizarre conduct.

Thereafter, pursuant to the terms of the agreement, the New York State Board of Mediation appointed Hon. Bernard Newman, arbitrator to hear and determine the dispute. Hearings were commenced but adjourned twice

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[1] Contrary to the statement contained in petitioner's petition for a writ of certiorari (bottom of page 5), petitioner was represented by counsel from the very beginning of the arbitration proceeding. See petitioner's notice of motion and affidavit to stay arbitration annexed hereto at Appendix, page 16.

[2] The contention that the contract never had a valid existence because a copy thereof signed by the union was not delivered to the petitioner, or because petitioner failed to post a performance bond, originated three months later. This argument was uniformly rejected by the arbitrator and by all judges as specious.

at Langemyr's request, upon his plea that a grand jury was investigating him. On November 2, 1964 the Grand Jury of Rockland County did indict the petitioner under Section 962-a of the Penal Law of the State of New York for willful failure and refusal to pay approximately $5,000.00 in supplemental wages to the four trust funds described above. Thereafter petitioner obtained an order to show cause staying the arbitration based upon an action for a declaratory judgment to declare invalid the agreement between the parties. After hearing argument on the motion, Special Term of the Supreme Court of New York, Rockland County, denied the motion for a stay and dismissed the complaint. The Appellate Division of the Supreme Court, Second Department, unanimously affirmed Special Term but, on a technicality only, permitted the complaint to stand pending the arbitrator's award, *Langemyr* v. *Campbell,* 23 A.D. 2d 371. The respondent then served upon petitioner a subpoena duces tecum requiring the production of his payroll records. Petitioner moved to quash the subpoena alleging that said subpoena compelled him to incriminate himself even though he intended to claim his constitutional right against self-incrimination. Special Term denied petitioner's motion and was unanimously affirmed by the Appellate Division which said that the proper time and place for petitioner to assert his constitutional privilege was at the hearing, *Langemyr* v. *Campbell,* 25 A.D. 2d 534.

In the Spring of 1966 the arbitration was finally held before Hon. Harry Uviller. Petitioner moved for a two year adjournment to June 30, 1968 and for two additional years to cover the statute of limitations, so as to avoid the possibility of a prosecution under New York State Penal Law, Sec. 962-a. The arbitrator denied the motion, although he did grant continuances so that 4 days of hearing were spread over two months. The Union called Langemyr as its witness. Petitioner asserted his constitutional privi-

lege against self-incrimination, refused to answer any question and, of course, did not produce his records. The Union therefore had to prove its case exclusively through its own independent proof and witnesses. The hearing lasted four days. Throughout the hearing Longemyr was represented by counsel who sharply attacked the Union's witnesses and proof. In his own defense petitioner called one witness and introduced into evidence various documents. Upon the conclusion of the hearing the arbitrator determined that petitioner owed $18,500.00 in supplemental wages and issued an appropriate award. The respondent then moved to confirm the arbitrator's award pursuant to CPLR 7510 and to dismiss petitioner's cause of action for declaratory judgment. Special Term confirmed the award and dismissed the action. The Appellate Division unanimously affirmed, in all respects, *Langemyr* v. *Campbell*, 279 N.Y.S. 2d 41. On February 14, 1968, the Court of Appeals of the State of New York unanimously affirmed the Appellate Division without opinion, 21 N.Y. 2d 796. Petitioner then moved to reargue and for leave to amend the remittitur. The motion to reargue was denied but the remittitur was amended to show that a constitutional question had been presented and passed upon and that there was no violation of petitioner's constitutional rights.

REASONS FOR DENYING THE PETITION

I. The petition for a writ of certiorari must be dismissed because it is not timely.

On February 14, 1968, the Court of Appeals of the State of New York unanimously affirmed the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department affirming two orders of the Supreme Court of the State of New York, County of Rockland. On February 26, 1968, petitioner moved before the Court of Appeals for leave to reargue, or in the alter-

native, for an order amending the remittitur to certify that a federal question was presented. By order dated April 10, 1968, the Court of Appeals denied petitioner's motion for reargument and granted the motion insofar as it sought the amendment of the remittitur. The order of April 10th was the final order and judgment of the Court of Appeals of the State of New York and fully adjudicated the matter.

On August 22, 1968 petitioner filed a petition for a writ of certiorari to review the order of the Court of Appeals dated April 10, 1968. More than 90 days had expired from the date of the order upon which the writ for certiorari was based.

A petition for a writ of certiorari to review a final judgment must be made to the United States Supreme Court within 90 days after entry of such judgment, 28 U.S.C. §2101(c).

It is the clear mandate of this court that where the order or judgment of the state court is final, and all rights have been fully adjudicated, the time to apply to this court for a writ of certiorari runs from the date of the order of the state court. *Dept. of Banking* v. *Pink*, 317 U.S. 264 (1942), rehearing denied 318 U.S. 802. The date when judgment of that order is entered on remittitur under local state practice has no bearing on the time within which to file a petition for a writ of certiorari.

The order of the Court of Appeals was dated April 10, 1968. It was entered in the office of the County Clerk of the County of Rockland, State of New York on May 27, 1968. The time to file a petition for certiorari started from the date of the order, April 10th and it is immaterial when the record and remittitur were physically lodged in the lower court's archives. *Hudson Distributors* v. *Eli Lilly*, 337 U.S. 386; *Market Street R. Co.* v. *Commission*, 324 U.S. 548; *Pickfield Oil Corp.* v. *State Board*, 329 U.S. 69; *Cole* v. *Violette*, 319 U.S. 581. The petition filed August 22, 1968

exceeded the 90 days' limitation. Nor was any extension of time obtained by petitioner.

As a result of petitioner's failure to comply with 28 U.S.C. §2101(c) this court does not have jurisdiction to review the judgment of the Court of Appeals. Therefore, the petition for a writ of certiorari must be dismissed.

II. No constitutional question is raised in that part of the petition for a writ of certiorari which deals with petitioner's action for declaratory judgment.

The first captioned case of the petition, bearing Rockland County Clerk's Index No. 2486-1964, is concerned exclusively with an action for declaratory judgment to declare the collective bargaining agreement between the parties null and void (See complaint in petitioner's appendix at pages 33a-36a). Assuming, arguendo, that the arbitrator erred in not granting petitioner's request for an adjournment of 4 years and two months in the arbitration hearing, such ruling had no effect whatever upon the action in Supreme Court, Rockland County, for a declaratory judgment. As stated in the opinion of Judge Donohue (Appendix, page 28a) and affirmed unanimously by the Appellate Division (Appendix, page 19a), the exclusive method of attacking the validity of a contract containing an arbitration clause is by an application under CPLR 7503. Petitioner's attorney knew that this was the proper way to proceed. He did move under CPLR 7503 and then abandoned his motion. The action for a declaratory judgment attempts to circumvent CPLR 7503, which the courts have ruled he may not do. The constitutionality of CPLR 7503 has never been challenged in any of these proceedings. The remittitur of the Court of Appeals refers only to the plea of self-incrimination which was invoked in the arbitration hearing. Therefore, this court may not review the determination of the state court dismissing the complaint in the action for declaratory judgment.

III. Petitioner's constitutional rights were preserved throughout the entire arbitration proceeding. He suffered no penalty because he invoked his constitutional privilege against self-incrimination.

Petitioner states that he did not testify at the arbitration hearing because he feared that such tesimony might be used against him in the pending criminal trial. Petitioner alleges that he was forced to plead the privilege against self-incrimination and thereby was not able to defend himself. Petitioner contends that because there was a criminal case pending involving the same subject matter, the arbitration hearing should have been stayed until after the criminal case was disposed of and until after the statute of limitations had run.

The law is well established in New York that a person who intends to claim the privilege against self-incrimination is not entitled to an adjournment of the pending action, but must proceed with the action and, when he is called upon to testify, then invoke the privilege at the time the questions are asked.

> "This Court has consistently held that the claim that an examination before trial ought not to be had because it might result in compelling the witness to give evidence against himself is not a proper ground for denying the examination. The right to refuse to incriminate oneself is a personal right and must be claimed at the time the questions are asked." *Heit & Weisenthal, Inc.* v. *Licht*, 218 App. Div. 753 (1926). See also *Tobias* v. *North American Importing Co., Inc.*, 133 Misc. 474, aff'd 225 App. Div. 699.

At the hearing, petitioner had the choice of testifying or invoking his privilege. As in *Heit*, this choice had to be made "at the time the questions are asked", that is, at the arbitration hearing. Petitioner chose to remain silent and invoked the privilege against self-incrimination. This

is the extent of his constitutional safeguard. Petitioner contends that having enjoyed the benefits of the privilege, that this nevertheless, constituted a penalty to him.

Petitioner attempted to distinguish the holdings of *Heit* and *Tobias* from the instant case by arguing that *Heit* and *Tobias* involved an examination before trial, whereas petitioner pleaded the privilege at an arbitration hearing. Petitioner thus acknowledges that there is no penalty for claiming the privilege on an examination before trial, but a penalty is incurred if the privilege is pleaded at the time of trial! Such reasoning is without merit. In upholding respondent's position, the Appellate Division specifically stated that "The situation here is analogous to those in *Heit & Weisenthal* v. *Licht*, 218 App. Div. 753, and *Tobias* v. *North American Importing Co.*, 133 Misc. 474, aff'd 225 App. Div. 699, wherein the plaintiffs were granted pre-trial examinations of the defendant despite the claim that such examinations might result in the defendants being compelled to incriminate themselves." Appendix, P. 12A, 13A.

Appellant attempts to identify this action with *Spevack* v. *Klein*, 385 U.S. 511, 87 Sup. Ct. 625 (1967), and *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967). In *Spevack* the Supreme Court held that an attorney who invoked the privilege against self-incrimination and as a direct result was disbarred, was, in fact, penalized for invoking the privilege. In *Garrity*, a police officer gave a statement in an investigation concerning ticket fixing after being informed that his job and pension would be forfeited if he invoked his privilege against self-incrimination. Thereafter, his statement was used to convict him in a criminal proceeding. The Supreme Court held that the failure to invoke the privilege was the result of a coerced confession. *Gardner* v. *Broderick*, 20 L. Ed. 2d 1082, 88 S. Ct. 1913, cited by petitioner is distinguishable from the instant case. In *Gardner*, this court held that a New York City Charter provision was invalid that provided for the dismissal of

a police officer called to testify before a grand jury, who refused to waive his privilege against self-incrimination and to sign a waiver of immunity from prosecution.

The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. The due process clause of the Fourteenth Amendment forbids compulsion of a defendant in a criminal prosecution to testify by fear of hurt, torture, exhaustion or any other type of coercion that falls within the scope of due process. *Adamson* v. *California*, 332 U.S. 546. *Garrity* and *Spevack* are extensions of this ruling. In *Garrity* this court said:

> "We now hold that the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic." 385 U.S. 493 at page 500.

Petitioner's reliance upon *Garrity and Spevack* is misplaced for in the instant case petitioner suffered no penalty by invoking the privilege. Nor did petitioner fail to invoke the privilege out of fear of penalty. On the contrary, petitioner chose not to incriminate himself and no sanction or penalty was imposed upon him as a result. He was not disbarred as in *Spevack* nor discharged as in *Garrity*. There was nothing automatic about the arbitrator's award. The arbitrator did not award the respondent $18,500.00 because petitioner invoked the Fifth Amendment. Respondent still had the burden of proving its case, which it did using its own witnesses and evidence exclusively. Petitioner actively defended himself at the arbitration hearing. He vigorously challenged all of respondent's evidence. Unlike *Gardner*, petitioner did not lose anything because he invoked the Fifth Amendment. The plain fact is that Langemyr profited greatly by claim-

ing his privilege, for had he produced his records the evidence would have revealed that over a period of two and a half years petitioner had underpaid his workers by an amount estimated between $30,000.00 and $49,000.00. Without the benefit of Langemyr's testimony or records and acting out of an excess of caution and leaning over backward to give the petitioner every possible benefit of a real or supposed doubt, the arbitrator awarded respondent only $18,500.00. Thus Langemyr not only enjoyed fully the intended privilege, but he saved himself $11,500.00 to $30,500.00 to boot!

Petitioner contends that the arbitration hearing should have been postponed until after the trial of the criminal case. Yet, in the companion criminal action, *People* v. *Tormod Langemyr* (Rockland County indictment number 64-90) petitioner moved before the Appellate Division of the State of New York, Second Department, to stay the criminal matter until after the civil action had been decided! There, too, petitioner urged that his constitutional rights would be violated unless the court granted such a stay. Obviously, petitioner hoped to play the civil action against the criminal action, obtain stays in both, and thereby elude his day of reckoning, both civilly and criminally. And all this was done behind a facade of allegedly safeguarding petitioner's constitutional rights. What petitioner really wanted was to so befuddle the court that somehow it would stay both the arbitration and the criminal action and direct a trial on the suit for declaratory judgment.

On the same day that the Appellate Division affirmed Special Term in the instant cases it also denied appellant's motion for a stay of the criminal trial as being "academic" because the civil cases (the instant actions) which petitioner wanted disposed of before the criminal trial, had, in fact, been decided. Appendix A, page 15. But, to date, four years after the indictment, petitioner has successfully avoided a trial in the criminal action.

A defendant who invokes his constitutional privilege enjoys the benefits of remaining silent. By remaining mute, to that extent, the defendant may make his own defense more difficult. But this is precisely the price to be paid in return for the benefit to be enjoyed. So long as the plea of privilege is not coerced by threat of punishment, penalty or forfeiture, one who has invoked the privilege has bought all he has bargained for. He is not entitled to more. Insofar as petitioner is concerned, he has effectively precluded any testimony given by him at the arbitration from being used against him in the criminal proceeding. There is no danger of violating the holding in *Garrity* v. *New Jersey, supra,* by using a statement obtained in a civil proceeding to convict in a criminal proceeding, for the reason that no statement exists. *Spevack* v. *Klein, supra,* and *Gardner* v. *Broderick, supra,* are not applicable because no penalty was invoked for asserting the Fifth Amendment privilege. Clearly petitioner's claim is a corruption of the doctrine against self-incrimination. The petition for a writ of certiorari raises no constitutional issues and must be rejected.

CONCLUSION

Petitioner's application for a writ of certiorari does not comply with 28 U.S.C. § 2101(c).

The suit for a declaratory judgment raises no constitutional issue.

The rule that a plea of the constitutional privilege against self-incrimination will not stay a civil action where there is a companion criminal action pending has received appellate judicial sanction in New York for at least the past 42 years. It is a salutary rule. Its elimination would create unjustified delays in civil litigation. Petitioner's attempts to stay both the criminal and the civil actions demonstrate a lack of good faith.

The petition for certiorari should be denied.

Dated: New York, N.Y.
October 1, 1968

Respectfully submitted,

ROBERT SILAGI,
Attorney for Respondents,
32 Broadway,
New York, N.Y. 10004.
212-943-8488

ROBERT SILAGI,
MITCHEL B. CRANER,
of Counsel.

APPENDIX A

Opinion and Order in the Criminal Proceeding Filed April 17, 1967.

APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

By: BEDLOCK, *P.J.* and RABIN, BENJAMIN, MUNDER and NOLAN, *JJ.*

People & C., plf. v. *Tormod Langemyr*, def. (R).

Application by defendant to stay trial in a criminal action pending determination of an appeal in a related civil action.

Motion denied as academic (See *Langemyr* v. *Campbell*, decided herewith).

APPENDIX B

Statute Involved

28 U.S.C. §2101(c)—*Supreme Court time for appeal or certiorari, docketing, stay.*

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

APPENDIX C

Notice of Motion to Stay Arbitration

SUPREME COURT: STATE OF NEW YORK

COUNTY OF ROCKLAND

In the Matter of the Arbitration

Between

LOCAL UNION No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO,

Union,

and

TOM CARPENTRY CONSTRUCTION CORP.,

Employer.

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Tormond Langemyr, sworn to on the 24th day of August, 1964, and upon Notice of Intention to Arbitrate, a motion pursuant to CPLR 7503(b) will be made at a Special Term of this court to be held at the courthouse thereof, located at Main Street, New City, New York, on the ninth day of September, 1964, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order staying arbitration upon the ground that Local Union No. 964 has failed to comply with a condition precedent in the existing contract and has failed to raise any issue in its Notice of Intention to Arbitrate, and for such other and further relief as may be just, proper and equitable.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b) answering affidavits, if any, are required to be

served upon the undersigned at least five days before the return date of this motion.

Dated, August 24, 1964.

Yours, etc.,

MOLONY & SCHOFIELD, ESQS.
Attorney for Tom Carpentry
Construction Company
137 So. Main Street
New City, New York

To:

ROBERT SILAGI, ESQ.
Attorney for Local Union No. 964
745 Fifth Avenue
New York, New York

NEW YORK STATE BOARD OF MEDIATION

Affidavit of Tormond Langemyr, Read in Support of Foregoing Motion

SUPREME COURT: STATE OF NEW YORK

COUNTY OF ROCKLAND

In the Matter of the Arbitration

Between

LOCAL UNION No. 964,
United Brotherhood of Carpenters
and Joiners of America, AFL-CIO,

Union,

and

TOM CARPENTRY CONSTRUCTION CORP.,

Employer.

STATE OF NEW YORK }
COUNTY OF ROCKLAND } ss.:

TORMOND LANGEMYR, doing business as Tom Carpentry Construction Company, being duly sworn, deposes and says:

That I have my principal place of business at 58 N. William Street, Pearl River, Rockland County, New York, that on August 13, 1964 I was served with a Notice of Intention to Arbitrate by Local Union No. 964, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, that a copy of the said Notice of Intention to Arbitrate is annexed as Exhibit I.

Affidavit of Tormond Langemyr

That there is presently a contract between your deponent and Local No. 964 which paragraph Twenty-Third provides as follows:

> A. Should any dispute arise between the parties hereto, regarding the interpretation, or application, of this Agreement, or any clause or provision or portion thereof, the parties agree to make an earnest effort to adjust, resolve and settle such dispute. Should the parties be unable to settle the matter, the dispute shall be submitted to Arbitration as set forth in Subparagraph B hereof within ten (10) days after the dispute has arisen, or the occurrence of the grievance.

At no time has any Official of Local Union No. 964 made any claim that there was a dispute between your deponent and Local Union No. 964 and to the best of your deponent's knowledge there is no dispute under the contract between your deponent and Local Union No. 964. Since paragraph Twenty-Third A requires as a condition precedent that the parties must make an earnest effort to adjust, resolve and settle this dispute, Local Union No. 964 has prematurely served a Notice of Intention to Arbitrate since they have not tried to settle this matter. This is a necessary condition precedent to making a demand for arbitration.

In addition, the Notice of Intention to Arbitrate fails to raise any issues between the parties:

Wherefore, your deponent respectfully requests that the arbitration of this matter be stayed.

s/ TORMOND LANGEMYR

(Sworn to August 24, 1964.)